

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

KEVIN RAY, Individually and on behalf of all others similarly situated,)	Case No.
)	
Plaintiff,)	CLASS ACTION COMPLAINT FOR:
)	
v.)	1. BREACH OF CONTRACT;
)	2. VIOLATION OF CONSUMER
)	PROTECTION ACT (RCW 19.86);
MICROSOFT CORPORATION, a Washington)	AND
Corporation, and certain unidentified Microsoft)	3. NEGLIGENCE
Corporation affiliates,)	
)	
Defendants.)	<u>JURY TRIAL DEMANDED</u>

SUMMARY OF CLAIMS

1. This is a class action against Microsoft and its affiliates for Breach of Contract, violation of the Washington Consumer Protection Act (“CPA”) (RCW 19.86) and, alternatively, Negligence. Plaintiff brings this action on behalf of himself and all other persons who experienced hardware problems with their Microsoft Xbox 360 gaming consoles following installation of Microsoft’s Fall 2006 Update for the Xbox 360.

THE PARTIES

2. Plaintiff Kevin Ray is an individual resident of California. Plaintiff is the original purchaser and current owner of an Xbox 360 gaming console. Plaintiff brings this action

1 individually and as a class action under Rule 23 of the Federal Rules of Civil Procedure on
2 behalf of the class specified herein.

3 3. Defendant Microsoft is a corporation organized under the laws of the State of
4 Washington, with its principal place of business at One Microsoft Way, Redmond, WA 98052-
5 6399. Microsoft is the manufacturer of the Xbox 360 gaming console (“Xbox 360) and also
6 provides support for the Xbox 360 through the <http://www.xbox.com> website. Further,
7 Microsoft, in conjunction with certain unknown “Microsoft Corporation affiliates” owns and
8 operates an online gaming service for Xbox gaming machines (including the Xbox 360) known
9 as “Xbox Live.” Purchasers of the Xbox 360 and users of Xbox Live within the United States
10 (located at <http://www.xbox.com/en-US/live/>) presumptively include citizens of every state in
11 the United States.
12

13 **JURISDICTION AND VENUE**

14
15 4. This Court has original jurisdiction over this action pursuant to 28 U.S.C. §
16 1332(d)(2) in that it is a class action filed under Rule 23 of the Federal Rules of Civil Procedure,
17 the matter in controversy, as aggregated pursuant to 28 U.S.C. §1332(d)(6), exceeds the sum of
18 \$5,000,000 exclusive of interest and costs, and a substantial number of members of the class of
19 plaintiffs are citizens of a state different from Microsoft
20

21 5. Venue is proper in the Western District of Washington pursuant to 28 U.S.C. §
22 1391(a) in that (1) Microsoft is a Washington Corporation with its principal place of business in
23 the Western District of Washington, (2) the events or omissions giving rise to the claims asserted
24 herein occurred in the State of Washington, and (3) Microsoft is subject to personal jurisdiction
25 in the State of Washington. In addition, the agreement between Microsoft and all members of
26 the class provides: “. . . you consent to the exclusive jurisdiction and venue of state or federal

1 courts in King County, Washington, USA for all disputes relating to this contract or the Service.”
2 King County is within the Western District of Washington.

3 6. With regard to certain unidentified Microsoft affiliates, venue is proper in the
4 Western District of Washington pursuant to 28 U.S.C. § 1391(a) in that (1) the Microsoft
5 affiliates’ corporate parent is a Washington Corporation with its principal place of business in the
6 Western District of Washington, (2) the events or omissions giving rise to the claims asserted
7 herein occurred in the State of Washington, and (3) the Microsoft affiliates are subject to
8 personal jurisdiction in the State of Washington.
9

10 **CLASS ACTION ALLEGATIONS**

11 7. Plaintiff brings this action as a class action pursuant to Federal Rule of Civil
12 Procedure 23(a), (b)(2), and (b)(3) on behalf of all persons who experienced hardware problems
13 with their Xbox 360 following installation of Microsoft’s Fall 2006 Update for the Xbox 360.
14 Excluded from the Class are Defendants, officers and directors of Defendants, members of their
15 immediate families and each of their legal representatives, heirs, successors or assigns and any
16 entity in which Defendants have or have had a controlling interest.
17

18 8. This action is properly maintainable as a class action because:

19 a. The members of the Class for whose benefit this action is brought are
20 dispersed throughout the United States and are so numerous that joinder of all Class members is
21 impracticable. While the exact number of Class members is unknown to Plaintiff at this time
22 and can only be ascertained through appropriate discovery, Plaintiff believes that Class members
23 number in at least the thousands. Members of the Class may be identified from records
24 maintained by Defendants and may be notified of the pendency of this action by mail, using a
25 form of notice similar to that customarily used in class actions;
26

1 b. Plaintiff's claims are typical of those of the Class as all members of the
2 Class are similarly affected by Defendants' actionable conduct as alleged herein;

3 c. Plaintiff will fairly and adequately protect the interests of the Class and
4 has retained counsel competent and experienced in class action litigation in the U.S. District
5 Courts. Plaintiff has no interests antagonistic to, or in conflict with, the Class that Plaintiff seeks
6 to represent;

7 d. A class action is superior to other available methods for the fair and
8 efficient adjudication of the claims asserted herein, because joinder of all members is
9 impracticable. Furthermore, because the damages suffered by individual members of the Class
10 may be relatively small, the expense and burden of individual litigation make it virtually
11 impossible for Class members to redress the wrongs done to them. The likelihood of individual
12 Class members prosecuting separate claims is remote;

13 e. Defendants have acted or refused to act on grounds generally applicable to
14 the class, thereby making appropriate final injunctive relief with respect to the class a whole;

15 f. Plaintiff anticipates no difficulties in the management of this action as a
16 class action; and

17 g. The questions of law and fact common to the members of the Class
18 predominate over any questions affecting individual members of the Class. Among the questions
19 of law and fact common to the Class are:

20 i. the pervasiveness of hardware problems in Xbox 360s caused by
21 the Fall 2006 Update;

- 1 ii. the existence of an agreement between Defendants and the Class
- 2 iii. the construction of the agreement between Defendants and the
- 3 Class;
- 4 iv. Defendants' acts and/or omissions as alleged herein;
- 5 v. whether Defendants have breached their agreement with the Class;
- 6 vi. whether Defendants have taken adequate measures to prevent
- 7 hardware problems in Xbox 360s caused by their Fall 2006
- 8 Update;
- 9 vii. whether Defendants have taken adequate measures to address the
- 10 hardware problems in Xbox 360s caused by their Fall 2006
- 11 Update;
- 12 viii. whether Defendants' release of the Fall 2006 Update was an
- 13 "unfair or deceptive act or practice" under Washington's CPA;
- 14 ix. whether Defendants' release of the Fall 2006 Update impacted the
- 15 "public interest" under Washington's CPA;
- 16 x. if no contract exists between Defendants and the Class, whether
- 17 the Defendants were negligent in releasing the Fall 2006 Update;
- 18 and
- 19 xi. to what extent the members of the Class have sustained damages
- 20 and the proper measure of damages.
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SUBSTANTIVE ALLEGATIONS COMMON TO ALL COUNTS

1. Microsoft's Xbox 360 Gaming Console

9. The Xbox 360 is Microsoft's latest video game console and was the first of the most advanced generation of game consoles. The Xbox 360 competes with Sony's PlayStation 3 and Nintendo's Wii. There are two different configurations of the Xbox 360, the Xbox 360 Premium Package and the Xbox 360 Core System. The suggested retail price for the Xbox 360 Premium Package is \$399.99 while the suggested retail price for the Xbox 360 Core System is \$299.99. According to Microsoft, as of November 2006, 10 million Xbox 360s will have been sold.

10. Xbox Live is an online multiplayer gaming and content delivery system operated and owned by Microsoft. Microsoft claims in its Xbox Live "Terms of Use" that certain "Microsoft Corporation Affiliates" may be operating the Xbox Live service depending on where the service is accessed, however, Microsoft has never identified those affiliates. In any event, both Xbox 360 configurations can make use of Xbox Live.

11. On the Xbox 360, updates to the console's internal software are delivered via Xbox Live. Whenever the Xbox 360 is powered on and is signed in to Xbox Live, the user will be prompted to download the current update if they have not already done so. On information and belief, the update process on Xbox Live does not prompt the user to agree to any additional terms and conditions prior to installing the update.

2. The Fall 2006 Update for Xbox 360

12. Beginning the morning of Tuesday, October 31, Defendants made the Fall 2006 update for the Xbox 360 available. This free update for Xbox 360 was distributed via Xbox Live

1 and available to all members of the Xbox Live community regardless of their level of service or
2 the configuration of their Xbox 360s.

3 13. Microsoft encouraged all Xbox 360 owners to download the Fall 2006 Update. In
4 the press release announcing the update, Microsoft said:

5 This free update will be distributed via the Xbox Live® online
6 gaming and entertainment network to all members (Xbox Live
7 Silver and Xbox Live Gold) with no disc or hard drive required.
8 Gamers without an Xbox Live account can easily sign up for free
9 by connecting their console to a broadband Internet connection.
Once online, downloading the update is fast and simple, and
provides instant access to features such as:

10 **Expanded HD Display and Video Playback Options**

11 * With 1080p resolution, gamers now have the ability to enjoy
12 both game and video content in the best HD resolution currently
available.

13 * Expanded video playback options increase the ways gamers
14 can enjoy video content on Xbox 360. It is now possible to stream
WMV video from a Windows PC running Windows Media Player
11 or Windows Media Connect.

15 * Gamers can now play video files from data CDs and DVDs, as
16 well as from storage devices like USB 2.0 flash drives and Xbox
360 Memory Units.

17 * Xbox 360 will support 50hz HDTV display modes, providing
18 viewers greater choice in how they watch DVD and HD DVD
content.

19 **Xbox Live Arcade Enhancements**

20 * Keeping up to date on Xbox Live Arcade games is now even
21 more convenient with the ability to automatically download newly
22 released Xbox Live Arcade trial games. This eliminates the need to
manually search for new downloads on Xbox Live Marketplace
each time a new game trial is released.

23 * Fast Enumeration of Games. You'll see the games in your
24 Xbox Live Arcade collection appear almost instantly. Get in and
play right away.

25 * With so many games to choose from, Xbox Live Arcade added
26 new sorting options such as "Recently Played" and "By Category."
These enhancements make managing Xbox Live Arcade
collections faster and easier than ever.

* A new expanded Friends Leaderboard within Xbox Live Arcade allows gamers to compare themselves directly against their friends and view leaderboard details of their top-10 friends.

* A new expanded Achievements View within Xbox Live Arcade lets gamers view their full Achievement details for their Arcade games including descriptions, icons, allotted Gamerscore and more, right from the Xbox Live Arcade dashboard interface.

* The "Play Now" launch feature has been streamlined. Selecting "Play Now" after downloading a game in Xbox Live Marketplace now bypasses Arcade and takes you directly to the game.

* Xbox Live Arcade now offers a "Tell a Friend" feature. Select this from the game info screen to send any friend on your friends list a message telling them about the Arcade game.

XNA Support

* Amateur game designers will be able to test and play the games they create using XNA Game Studio Express on their Xbox 360 systems when it launches later this year (separate download and subscription required).

These features are just some of the enhancements gamers and developers can expect as part of the Autumn update. For a complete list of updates, visit <http://www.xbox.com/live>.

Microsoft is committed to providing Xbox 360 customers with the best online experience possible and delivering added value to Xbox Live Gold subscribers. Those subscribers will enjoy exclusive early access to special Xbox Live Marketplace content, such as game demos, free game ad-ons, free community videos, and free Gamer pics and themes for up to one week in advance of their general release. Paid downloadable content remains available at the same time for both Silver and gold subscribers.

Through these regular updates, the way gamers are connected to their friends and entertainment is constantly evolving and improving. With more than 4-million Xbox Live members to date, Xbox 360 has proven itself as the premiere gaming platform of choice.

14. Thousands of Xbox 360 owners responded to Microsoft's enticement and downloaded the Fall 2006 update as soon as it became available.

15. Almost immediately, reports began to circulate on the Internet that Xbox 360 users who had installed the Fall 2006 Update were experiencing new and serious hardware

1 problems. The most common and obvious problem reported after installation was that the Xbox
2 360 immediately rebooted and showed an error message following which, the Xbox 360 was
3 permanently non-functional. Xbox 360 users refer to this phenomenon by the slang term
4 “bricking” (meaning that the device is now only useful as a “brick”). As of today, a Google
5 search of the terms “xbox 360” and “brick” or “bricking” shows over 15,000 results.
6

7 16. Other complaints have also been reported by Xbox 360 users following
8 installation of the Fall 2006 Update, including unstable performance and system freezes.

9 17. On November 1, 2006, Microsoft’s Xbox Live Director of Programming Larry
10 Hryb (“Hryb”) acknowledged on his personal website <http://www.majornelson.com> that there
11 were problems with the Fall 2006 update. Under his Xbox Live name of “Major Nelson,” Hryb
12 posted that:
13

14 It turns out that there is a very small number of people are having
15 issues with the Fall update that we rolled out a couple of days ago.
16 I just spoke to the Dashboard team, and they are aware of it and
17 working on an update that we will rolling out in a matter of hours,
18 not days. If you already have the update and you are connected to
19 Xbox Live and playing games etc., then you can continue on with
20 your day. If you are having problems, call your local Xbox Support
21 number (get your local number from Xbox.com) and they’ll get
22 you taken care of. I’ll update this post when the update is available,
23 but as I said...if you are up and running now on Live...you don’t
24 have anything to worry about and this won’t affect you.

25 18. Notwithstanding Hryb’s contention, it seems that the number of Xbox 360 users
26 having issues with the fall update is anything but small, and there continue to be numerous
complaints circulating about the Fall 2006 update.

19. Despite acknowledging the existence of the problem, Defendants have refused to
make complete restitution to owners of Xbox 360s damaged by the Fall 2006 update. For those
owners of Xbox 360s “bricked” by the Fall 2006 update, the machine cannot be updated via

Xbox Live and will require either a replacement machine or for new software to be installed by Microsoft itself through a physical flash of the machine's internal memory. Microsoft is however refusing to make repairs or replacement without users paying the cost of shipping the machine to Microsoft. Microsoft is charging users up to \$140 to ship an Xbox 360 back to Microsoft for repair or replacement. This cost of shipping is in excess of 35% of the suggested retail price of an Xbox 360 Premium Package and in excess of 46% of the suggested retail price of an Xbox 360 Core System.

20. Prior to November 1, 2006, Plaintiff's Xbox 360 was functioning normally. On or about November 1, 2006, Plaintiff updated his Xbox 360 with the Fall 2006 Update. Following the installation of the update, Plaintiff's Xbox 360 was "bricked" and is now completely non-functional. Microsoft has refused to repair or replace Plaintiff's Xbox 360 unless he pays for shipping back to Microsoft.

FIRST CAUSE OF ACTION

(BREACH OF CONTRACT)

21. Plaintiff realleges the preceding paragraphs as if set forth here.

22. Defendants have an Agreement with the Class known as the "Xbox Live Terms of Use" ("TOU"). The TOU provides:

This contract covers your use of this service via an original Xbox console, an Xbox 360 console or a personal computer as applicable, and includes any other related services for which you choose to sign up (for example, specific game subscriptions), content and other media (for example, items downloaded from Xbox Live Marketplace), software, machines, support, papers, *updates, or upgrades.*

(emphasis added).

1 23. The TOU provides that, “[i]f this contract is with Microsoft Corporation, then
2 claims for breach of this contract will be subject to the laws of the State of Washington, without
3 reference to conflict of laws principles.”

4 24. While the TOU also seeks to limit Defendants’ liability, disclaim any warranties
5 and limit the Class’s remedies, these limitations and disclaimers are unenforceable under
6 Washington law because they are procedurally unconscionable in that:
7

8 a. on information and belief, the TOU is never shown to the Class when they
9 sign up for Xbox Live via the Xbox 360;

10 b. the limitations and disclaimers are not specifically negotiated between
11 Defendants and each member of the Class;

12 25. Further, the limitations and disclaimers contained in the TOU are unenforceable
13 under Washington law because they are substantively unconscionable in that the limited remedy
14 provided to the Class under the TOU fails of its essential purpose because it deprives the Class of
15 the substantive value of its bargain due to an undiscoverable defect.
16

17 26. Defendants’ conduct is a breach of the implied terms of the TOU as well as
18 Defendants’ obligation of good faith and fair dealing.

19 27. As a direct and proximate result of Defendants’ breach, Plaintiff and the Class
20 have been damaged in an amount to be determined at trial but in excess of an aggregated amount
21 of \$5,000,000.
22

23 28. Plaintiff and the Class are also entitled to declaratory and injunctive relief
24 requiring Defendants to repair or replace all Xbox 360s damaged by the Fall 2006 Update free of
25 any charge including shipping.
26

SECOND CAUSE OF ACTION

(VIOLATION OF WASHINGTON CONSUMER PROTECTION ACT)

(RCW 19.86)

29. Plaintiff realleges the preceding paragraphs as if set forth fully here.

30. As described above, the TOU provides that it shall be governed by Washington law. RCW 19.86.090 provides a private right of action to any person injured in his property by an “unfair or deceptive act or practice.”

31. Defendants’ release of the Fall 2006 Update and their failure to disclose to the Class that the update might cause damage to the Class’s property violates the Washington Consumer Protection Act because: 1) it was an unfair or deceptive act or practice; 2) committed in the course of Defendants’ business; 3) with a public interest impact (on information and belief Defendants’ actions and inactions affected at least hundreds of thousands of consumers and has the potential to affect millions of consumers); which has caused 4) injury to plaintiff’s property and the similar property of the plaintiff class.

32. Pursuant to RCW 19.86.090, plaintiff seeks damages on behalf of himself and each class member for their actual damages sustained as a result of Defendants’ unfair and deceptive act in an amount to be determined at trial but not less than \$5,000,000 as well as the costs of this suit and reasonable attorneys’ fees.

33. Further, pursuant to RCW 19.86.090, plaintiff seeks treble damages on behalf of himself and each class member for their actual damages sustained as a result of Defendants’ unfair and deceptive act in an amount to be determined at trial but not less than \$15,000,000.

THIRD CAUSE OF ACTION

(ALTERNATIVE CAUSE OF ACTION)

(NEGLIGENCE)

34. Plaintiff realleges the preceding paragraphs as if set forth fully here.

35. If Defendants contend that there is no agreement with the Class, Defendants are liable to Plaintiff and the Class for their negligence in releasing the Fall 2006 Update.

36. Defendants had a duty to refrain from releasing software that would cause damage to Xbox 360s and the release of the Fall 2006 Update violated that duty causing damage to Plaintiff and the Class in an amount to be determined at trial but not less than \$5,000,000.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff, individually and on behalf of all those similarly situated, prays for judgment against Defendants as follows:

Certifying this action as a class action;

ii. Declaring that Defendants' release of the Fall 2006 Update which caused damage to the Plaintiff and the Class was a breach of contract and of Defendants' implied duty of good faith and fair dealing;

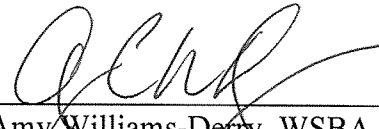
iii. Awarding Plaintiff and the Class damages for Defendants' breach of contract in an amount to be determined at trial but not less than an aggregate amount in excess of \$5,000,000;

iv. Declaring that Defendants' conduct violates the CPA and awarding plaintiff and the class restitution and damages for such violation;

- v. Awarding Plaintiff and the Class damages for Defendants' negligent act in an amount to be determined at trial but not less than an aggregate amount in excess of \$5,000,000;
- vi. Awarding counsel for Plaintiff and the Class reasonable attorneys' fees and costs; and
- vii. Granting such other and further relief that this Court may deem just and proper.

DATED this 29th day of November, 2006.

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